

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
 Enrolled - Revised

Senate Bill 1010

(Senator Zucker, *et al.*)

Finance

Economic Matters

Disclosing Sexual Harassment in the Workplace Act of 2018

This bill establishes that, except as prohibited by federal law, a provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment is null and void as being against the public policy of the State. An employer with 50 or more employees must submit a short survey by July 1, 2020, and by July 1, 2022, to the Maryland Commission on Civil Rights (MCCR) on sexual harassment settlements. MCCR must publish specified information from the surveys (making them accessible on its website), retain responses for public inspection on request, and create an executive summary on a random selection of surveys. **Provisions related to the survey of sexual harassment settlements terminate June 30, 2023.**

Fiscal Summary

State Effect: No effect in FY 2019. General fund expenditures increase by at least \$25,000 in FY 2020 to implement the bill. Out-years reflect elimination of one-time costs and intermittent use of a contractual position. The bill’s survey requirements do not apply to the State as an employer. Revenues are not affected.

| (in dollars) | FY 2019 | FY 2020 | FY 2021 | FY 2022 | FY 2023 |
|----------------|---------|------------|------------|------------|------------|
| Revenues | \$0 | \$0 | \$0 | \$0 | \$0 |
| GF Expenditure | 0 | 25,000 | 10,500 | 10,800 | 11,200 |
| Net Effect | \$0 | (\$25,000) | (\$10,500) | (\$10,800) | (\$11,200) |

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None. The bill’s survey requirements do not apply to local governments as employers.

Small Business Effect: Minimal.

Analysis

Bill Summary: An employer is prohibited from taking specified adverse actions against an employee who fails or refuses to enter into an agreement that contains a void waiver. An employer who enforces or attempts to enforce an employment contract, policy, or agreement that contains a waiver that is void is liable for the employee's reasonable attorney's fees and costs. The bill applies to any employment contract, policy, or agreement that is executed, extended, or renewed on or after October 1, 2018.

By July 1 of 2020 and 2022, an employer with 50 or more employees must submit a short survey electronically to MCCR on:

- the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee;
- the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and
- the number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential.

MCCR must include space in the survey for an employer to report whether the employer took personnel action against an employee who was the subject of a specified settlement. MCCR must post the aggregate number of responses from employers for each item listed in the survey and retain for public inspection, on request, the response from a specific employer regarding a specific survey question. By December 15 of 2020 and 2022, MCCR must review a random selection of submitted surveys, create an executive summary of the sample (redacting any identifying information for specific employers), and submit the executive summary to the Governor, the Senate Finance Committee, and the House Economic Matters Committee.

Current Law: Sexual harassment is a form of sex-based discrimination. State law generally prohibits an employer with at least 15 employees from discharging, failing or refusing to hire, or otherwise discriminating against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability. For the purposes of this prohibition, the State and local governments are considered employers.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national

origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

Antidiscrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. If EEOC finds that discrimination has occurred, it tries to settle the charge. If not successful, EEOC has the authority to file a lawsuit to protect the rights of individuals and the interests of the public but does not, however, file lawsuits in all cases in which there was a finding of discrimination.

An individual alleging employment discrimination may file a complaint with MCCR. When a charge is filed with MCCR, it is automatically “dual-filed” with EEOC if federal laws apply. If a complaint is filed with MCCR and an agreement to remedy and eliminate the discrimination cannot be reached, the matter may be heard before an administrative law judge. Remedies available on a finding that the respondent is engaging or has engaged in an unlawful employment practice include (1) enjoining the respondent from engaging in the discriminatory act; (2) ordering appropriate affirmative relief; (3) awarding compensatory damages for pecuniary and nonpecuniary losses; and (4) ordering any other equitable relief that the administrative law judge considers appropriate.

A complainant or a respondent may elect to have the claims asserted in a complaint alleging an unlawful employment practice determined in a civil action brought by MCCR on the complainant’s behalf if (1) MCCR has found probable cause to believe the respondent has engaged or is engaging in an unlawful employment practice and (2) there is a failure to reach an agreement to remedy and eliminate the practice. MCCR may also elect to have the claims asserted within the complaint determined in a civil action brought on its own behalf under the same conditions. If an election for a civil action is made, MCCR must file, within 60 days after the election, a civil action in the circuit court for the county where the alleged discrimination occurred. On a finding that discrimination occurred, the court may provide the remedies specified above.

A complainant may file a private civil action against the respondent if (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging discrimination; (2) at least 180 days have elapsed since the filing of this complaint or charge; and (3) the civil action is filed within two years after the alleged discrimination occurred. In addition to the remedies specified above, the court may award punitive damages if (1) the respondent is not a governmental unit or political subdivision and (2) the court finds that the respondent has engaged or is engaging in discrimination

with actual malice. The filing of a private cause of action automatically terminates any proceeding before MCCR based on the underlying administrative complaint and any amendment to the complaint. Any party may demand a jury trial if a complainant seeks compensatory or punitive damages. Pursuant to § 20-1015 of the State Government Article, a court may award the prevailing party in a civil action reasonable attorney’s fees, expert witness fees, and costs.

State Expenditures: There are approximately 8,500 businesses in Maryland with at least 50 employees. Thus, MCCR must collect approximately 8,500 surveys from these businesses by July 1 of 2020 and 2022 and store their responses in a manner that is easily accessible. MCCR anticipates needing additional contractual staff to do so and incurring software and information technology (IT) costs, so MCCR estimates that general fund expenditures increase beginning in fiscal 2020. IT costs may include acquiring storage space to hold survey responses and creating a system to track the companies that have submitted responses. Additional contractual staff may be needed to respond to requests for public inspection and to follow up with companies that do not comply with the bill’s survey requirements. MCCR also needs to create the survey for businesses to use.

While the Department of Legislative Services (DLS) agrees with MCCR that the bill creates additional responsibilities for MCCR, DLS assumes one part-time administrator is needed for only calendar years 2020 and 2022 to implement the bill. Thus, costs are incurred for six months of each fiscal year from 2020 through 2023, even though the administrator is not employed in calendar year 2021. The Department of Information Technology estimates the IT costs to develop the survey and collect and maintain the data are approximately \$10,000. Accordingly, general fund expenditures increase by at least \$25,019 in fiscal 2020, which assumes expenses for IT costs and the part-time administrator begin January 1, 2020. This estimate reflects the cost of hiring one part-time contractual administrator to develop and manage the surveys, respond to information requests, and create an executive summary in calendar years 2020 and 2022. Thus, it includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses for the second half of fiscal 2020.

| | |
|---|-----------------|
| Contractual Position | 0.5 |
| Salary and Fringe Benefits | \$9,973 |
| IT and Other One-time Start-up Costs | 14,890 |
| Operating Expenses | <u>156</u> |
| Total FY 2020 State Expenditures | \$25,019 |

Future fiscal year expenditures reflect a half-year salary with annual increases and employee turnover, the termination of one-time costs, and ongoing operating expenses. To the extent that there are a significant number of information requests or that survey administration and retention of data cannot be fully automated, the part-time contractual

administrator may need to convert to a full-time contractual position and more contractual staff may be needed.

This estimate does not include any health insurance costs that could be incurred for the specified contractual employee under the State's implementation of the federal Patient Protection and Affordable Care Act.

MCCR can investigate any additional complaints of sex-based discrimination (*i.e.*, sexual harassment) that stem from void employment agreements with existing resources.

The Department of Labor, Licensing, and Regulation can implement and enforce the provisions of the bill relating to void employment agreements with existing resources.

Additional Information

Prior Introductions: None.

Cross File: HB 1596 (Delegate Valderrama, *et al.*) - Economic Matters.

Information Source(s): Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Information Technology; U.S. Census Bureau; U.S. Equal Employment Opportunity Commission; Department of Legislative Services

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